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*Via Electronic Filing and First Class Mail*

March 5, 2020

Mark D. Marini, Secretary  
Commonwealth of Massachusetts  
Department of Public Utilities  
One South Station, 5<sup>th</sup> Floor  
Boston, Massachusetts 02110

**Re: D.P.U. 19-07 – Investigation by the Department of Public Utilities on its Own Motion into Initiatives to Promote and Protect Consumer Interests in the Retail Electric Competitive Supply Market**

Dear Mr. Marini:

In connection with the above-referenced matter, enclosed please find one original and two copies of Vistra Energy Corp.<sup>1</sup> comments on the Hearing Officer's February 5, 2020 Memorandum.

Please do not hesitate to contact me if you have any questions or require additional information. Thank you.

Sincerely,

  
Eric K. Runge

Enclosure

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<sup>i</sup> Vistra Energy Corp. is the parent company for, and filing on behalf of, Massachusetts licensed suppliers Ambit Northeast, LLC; Dynegy Energy Services, LLC; Public Power, LLC; Viridian Energy, LLC; Everyday Energy, LLC d/b/a/ Energy Rewards; and Massachusetts Gas & Electric, Inc.

**COMMONWEALTH OF MASSACHUSETTS**  
**DEPARTMENT OF PUBLIC UTILITIES**

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INVESTIGATION BY THE DEPARTMENT OF :  
PUBLIC UTILITIES ON ITS OWN MOTION INTO :  
INITIATIVES TO PROMOTE AND PROTECT : D.P.U. 19-07  
CONSUMER INTERESTS IN THE RETAIL :  
ELECTRIC COMPETITIVE SUPPLY MARKET. :  
:

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**COMMENTS OF VISTRA ENERGY CORP.**

Vistra Energy Corp.<sup>1</sup> (“Vistra”) hereby submits comments on the Hearing Officer’s February 5, 2020 Memorandum<sup>2</sup> in the above-captioned proceeding.

**BACKGROUND**

Pursuant to its January 18, 2019 Vote and Order Opening Investigation (“Order”), the Department of Public Utilities (“Department”) opened an investigation “to seek input from stakeholders on initiatives to further improve the retail electric competitive supply market in the Commonwealth of Massachusetts.”<sup>3</sup> In the Order, the Department invited all interested persons to submit written comments and indicated that it would determine the appropriate next steps after reviewing the initial comments.<sup>4</sup> Following this initial round of comments, the Department held a technical session on June 6, 2019<sup>5</sup> and formed working groups to address customer awareness

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<sup>1</sup> Vistra Energy Corp. is the parent company for, and filing on behalf of, Massachusetts licensed suppliers Ambit Northeast, LLC; Dynegy Energy Services, LLC; Public Power, LLC; Viridian Energy, LLC; Everyday Energy, LLC d/b/a/ Energy Rewards; and Massachusetts Gas & Electric, Inc.

<sup>2</sup> Memorandum of Gregory Wade, Hearing Officer, to Distribution List (Feb. 5, 2020) (“February 5 Memorandum”).

<sup>3</sup> Order, at 1.

<sup>4</sup> *Id.* at 14-15.

<sup>5</sup> See Hearing Officer Memorandum/Electronic Mail Correspondence (May 31, 2019).

initiatives and the Energy Switch website.<sup>6</sup> These working groups initially met on June 26, 2019.<sup>7</sup> The Energy Switch website working group met again on July 31, 2019,<sup>8</sup> and the customer protection working group met again on August 6, 2019.<sup>9</sup>

On November 1, 2019, the Department held a technical session to discuss its “Tier One” and “Tier Two” initiatives.<sup>10</sup> Tier One initiatives include: review of license applications, third-party marketing vendors, door-to-door marketing notification, marketing materials, marketing scripts, contract summary form, marketing recordings, automatic renewal notifications/reports, supplier enrollment reports, and the Energy Switch website.<sup>11</sup> Tier Two initiatives include: customer account number requirements, third-party verification, automatic renewal product limitations, and low-income customer product limitations.<sup>12</sup> On February 5, 2020, the Hearing Officer issued a Memorandum inviting comments on Tier One initiatives by March 5, 2020 and comments on Tier Two initiatives and the proposed license renewal process by March 19, 2020.<sup>13</sup> After receiving and reviewing comments, the Department expects to issue an order on Tier One initiatives.<sup>14</sup> Vistra hereby submits its comments on Tier One initiatives.

### **COMMENTS**

Vistra appreciates the Department’s diligence to determine the appropriate consumer protections to improve the commonwealth’s thriving retail competitive supply market. The working group process has already resulted in several important proposals. Vistra, however, notes

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<sup>6</sup> See Hearing Officer Memorandum/Electronic Mail Correspondence (Jun. 7, 2019).

<sup>7</sup> See Hearing Officer Memorandum/Electronic Mail Correspondence (Jun. 14, 2019).

<sup>8</sup> See Hearing Officer Memorandum/Electronic Mail Correspondence (Jul. 12, 2019).

<sup>9</sup> See Hearing Officer Memorandum/Electronic Mail Correspondence (Jul. 26, 2019).

<sup>10</sup> See Memorandum of Gregory Wade, Hearing Officer, to Distribution List (Oct. 30, 2019).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> February 5 Memorandum, at 21.

<sup>14</sup> *Id.* at 22.

that there remain a few disconnects between some of the Department's proposals and the stated goal or purpose for that same proposal. For the reasons discussed more fully below, Vistra believes that some of the proposed requirements suggested by the Department should not be adopted or should be revised as proposed by Vistra prior to adoption.

**I. NOTIFICATION OF DOOR-TO-DOOR MARKETING SHOULD ACCOUNT FOR OPERATIONAL FLEXIBILITY**

In its February 5 Memorandum, the Department proposes that competitive suppliers submit a separate door-to-door marketing notification for each day that they expect to conduct door-to-door marketing no later than two business days prior to the applicable marketing day.<sup>15</sup> In addition, the proposed notice would only allow for a maximum of three municipalities to be listed in each notification and, for large municipalities, requires identification of the specific neighborhoods where the door-to-door marketing would occur.<sup>16</sup>

Vistra understands the Department's desire to capture useful information about where a competitive supplier may be door-to-door marketing on any particular day<sup>17</sup> and appreciates the Department's acknowledgement that the door-to-door notification should provide for flexibility to respond to current conditions. The requirement that the notice be provided no later than two business days prior to the applicable marketing day coupled with the limitation on the number of municipalities that can be included, however, prohibits the exact type of flexibility the Department acknowledges is desirable, to the disadvantage of residential customers.

Assuming it was the Department's intent to only allow one notice per day, a competitive supplier would need to determine the three municipalities or neighborhoods in which it will door-

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<sup>15</sup> February 5 Memorandum, at 7.

<sup>16</sup> *Id.* at 8.

<sup>17</sup> *Id.* at 7-8.

to-door market two business days in advance. First, implementing such a notification requirement may inadvertently harm residential customers in smaller municipalities. If a competitive supplier can only select three municipalities each day in which to door-to-door market, it may lead to more activity in mid-to large-sized municipalities. Municipalities in the commonwealth are of varying sizes from towns such as New Ashford in the Berkshires with a population of 228<sup>18</sup> to cities such as Worcester with a population over 180,000.<sup>19</sup> Even if the Department limits the large municipalities just to neighborhoods, those municipalities may have larger neighbors than most towns. For instance, Dorchester, a neighborhood of Boston, has a population of 111,195.<sup>20</sup> Limiting the number of municipalities or neighborhoods to three (or, for that matter, any specified amount) seems arbitrary and does nothing to address the Department's stated concern that it identifies where a competitive supplier is marketing on any particular day. Furthermore, there may be legitimate reasons that a competitive supplier may need to change the municipalities or neighborhood in which it markets door-to-door on the day scheduled for the marketing. For instance, there may be inclement weather or its sales force scheduled for a specific municipality or neighborhood may be unavailable due to staffing issues, such as illnesses or unexpected absences.

Vistra appreciates the Department's need for real time information, but it believes there are other solutions to address this concern without the potential harm to customers or operational limitations to competitive suppliers. Vistra proposes that competitive suppliers could make a filing by 12:00 PM (noon) the day they are conducting the door-to-door marketing with no limitation on

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<sup>18</sup> See City-Data.com, available at: <https://www.city-data.com/city/Massachusetts3.html>

<sup>19</sup> *Id.*

<sup>20</sup> See City-Data.com, available at: <http://www.city-data.com/neighborhood/Dorchester-Boston-MA.html>

the number of municipalities or neighborhoods in which that supplier can door-to-door market.<sup>21</sup> This proposal strikes a balance between providing the Department with more accurate, real-time data while accounting for the operational flexibility inherently necessary to a competitive supplier's business model. Conversely, the Department could require a filing by 12:00 PM (noon) the business day after each day door-to-door marketing was conducted with a list of the municipalities and, for Boston, the neighborhoods in which the competitive supplier marketed. The benefit to the after-the-fact reporting is that the Department would receive each day a complete list of municipalities where door-to-door marketing was actually conducted. This directly accomplishes the Department's goals of knowing where a competitive supplier was on a particular day by providing the data to the Department on the same day the door-to-door marketing occurred. In either proposal – a noon filing the day the door-to-door marketing occurs or a noon filing the business day after the door-to-door marketing occurs – Vistra notes that if the Department receives any customer questions regarding door-to-door marketing operations, its designated employee contacts would be available to answer questions or provide additional information to the Department as needed.

## **II. DOOR-TO-DOOR AND TELEMARKETING SCRIPTS SHOULD ALLOW THE SUPPLIER TO IDENTIFY THE CUSTOMER'S DISTRIBUTION COMPANY TO ASSIST THE CUSTOMER**

In its February 5 Memorandum, the Department proposes to adopt door-to-door marketing and telemarketing scripts “with the caveat that at no time during door-to-door and telemarketing interactions shall the marketing agent identify the name of a customer's distribution

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<sup>21</sup> To the extent the door-to-door marketing is conducted over the weekend, the filing would be submitted by noon eastern the following business day.

company....”<sup>22</sup> Vistra encourages the Department not to adopt such a restriction, which only harms the customer.

First and foremost, the Attorney General has determined it an unfair or deceptive act or practice for a competitive supplier to make a material representation relating to the “business relationship between any retail seller of electricity and any distribution company.”<sup>23</sup> The Department requires “[a]ll advertisements [to] comply with state and federal regulations governing advertising, including the Attorney General’s regulations....”<sup>24</sup> The use of the distribution company’s name to deceive the customer is, therefore, already prohibited by regulation. The Department can investigate competitive suppliers violating these provisions.<sup>25</sup>

There are legitimate reasons for identifying the name of a customer’s distribution company. For instance, the Department in its February 5 Memorandum requires competitive suppliers conducting telesales to include “information in the Staff Proposed Final Contract Summary Form orally....”<sup>26</sup> The Staff Proposed Contract Summary Forms include distribution company information.<sup>27</sup> Not only does the Department acknowledge the importance to customers of knowing their distribution company name by including it on the contract summary, Vistra believes even if not required on the contract summary there are other legitimate reasons a competitive supplier would mention a distribution company. For instance, what if the customer asks the sales agent for the name of their distribution company? The Department’s proposal would prohibit an

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<sup>22</sup> February 5 Memorandum, at 11-12.

<sup>23</sup> 940 CMR 19.04(c); *see also* 940 CMR 3.05(2) (“No advertisement shall be used which would mislead or tend to mislead buyers or prospective buyers...as to the product being offered for sale.”).

<sup>24</sup> 220 CMR 11.06(6); *see also* 220 CMR 14.05(2).

<sup>25</sup> *See, generally*, DPU 16-156, *Investigation by the Department of Public Utilities on its own Motion to Establish Interim Guidelines for Competitive Supply Formal Investigations and Proceedings*.

<sup>26</sup> February 5 Memorandum, at 11.

<sup>27</sup> *See id.* at 25 and 26.

agent from providing this information to the customer. This could cause both customer confusion and customer frustration. Ironically, it may lead to complaints where customers are under the impression that the competitive supplier is being misleading by withholding this information.

Vistra encourages the Department to rely on the existing regulatory structure that prohibits the use of a distribution company's name for deceptive purposes and otherwise allow a competitive supplier to fully engage the customer during a door-to-door sale or telesales, including answering customer questions regarding their distribution company. The current regulations allow the Department the appropriate remedial authority to address any inappropriate competitive supplier behavior. It need not introduce additional supplier limitations that will only result in greater customer frustration. To the extent the Department moves forward with this requirement as proposed in its February 5 Memorandum, Vistra requests that the Department clarify that suppliers are not required to orally provide the distribution company information included in the contract summary.

### **III. RECORDING OF MARKETING INTERACTIONS SHOULD EXCLUDE THOSE TELESALES CALLS THAT RESULT IN VOICEMAILS**

In its February 5 Memorandum, the Department proposes to record telemarketing calls.<sup>28</sup> While Vistra believes that the recording of such calls are unnecessary and the Department should rely on third-party verification recordings, to the extent the Department proceeds to adopt such a requirement, Vistra encourages the Department to clarify that it excludes calls that do not result in a sale as well as any telemarketing call that results in a supplier call being placed to voicemail, regardless of whether the call results in a sale or not. Often these voicemails a competitive supplier leaves for current customers are nothing more than a request for the customer to return the call. These voicemails, therefore, do not serve to further the Department's goal of "identifying any

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<sup>28</sup> See February 5 Memorandum, at 12.



misleading or deceptive marketing”<sup>29</sup>. Instead, recording and retaining these voicemails would be unreasonable and burdensome as it is Vistra’s experience that more often than not there is at least one voicemail during the course of a telesales exchange to the extent the customer has a question that requires follow-up by a sales agent.

Alternatively, the Department could require that all telesales calls over two minutes resulting in a successful sale be recorded and retained to discount a majority of voicemails. However, a two minute exemption may not capture all voicemails and could capture some substantive calls. Thus, Vistra believes the Department should clarify that recording and retention of telesales calls only includes those calls resulting in a sale and excludes any calls resulting in voicemails.

Furthermore, to the extent the Department imposes a record retention policy on these telemarketing sales, Vistra requests that competitive suppliers be required to retain the recordings for no more than two (2) years. There are significant costs and logistics associated with storing data and no evidence of the customer benefit for a longer retention period. It is Vistra’s experience that customers typically have the most number of questions closest to when the contract begins.

#### **IV. PRICING UPDATES IN DIRECT MAIL MARKETING SHOULD NOT REQUIRE DEPARTMENT REVIEW**

In its February 5 Memorandum, the Department proposes that competitive suppliers would be required to submit updated versions of direct mail marketing materials for Department review prior to the use of those materials.<sup>30</sup> These direct mail marketing materials are required to include, *inter alia*, “pertinent information about the product(s) being marketed....”<sup>31</sup> The Department

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<sup>29</sup> February 5 Memorandum, at 13.

<sup>30</sup> *See id.* at 14.

<sup>31</sup> *Id.*

would have ten business days to review and respond to the competitive supplier and, if no response is provided within that timeframe, the competitive supplier could use those direct mail marketing materials.<sup>32</sup>

Vistra appreciates the Department's goal to receive up-to-date marketing materials.<sup>33</sup> That goal, however, can be achieved by a competitive supplier providing the direct mail marketing templates for Department review instead of the product-specific materials. For instance, a competitive supplier may use the same template form and update just the product-specific information, such as pricing. To the extent these product-specific items are the only aspects being updated in direct mail marketing materials, the Department should not need to continuously review those changes. Otherwise, it is tantamount to price regulation. Customers benefit from the immediate release of new pricing information once the competitive supplier sets that price internally. Requiring a holding period of ten business days on new pricing further serves to frustrate the customer by delaying the availability of new plans. Furthermore, the Department already contemplates that review of a template is sufficient for its oversight purposes. In its February 5 Memorandum, the Department requires submission of certain "contract summary forms", and not the actual contract summaries, for Department review.<sup>34</sup>

A competitive supplier should be able to freely update and deploy such materials without waiting the ten business day period so long as the Department has previously approved a template of the same direct mail marketing materials. This approach provides the Department the type of oversight over current marketing materials while allowing competitive suppliers the type of

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<sup>32</sup> February 5 Memorandum, at 14.

<sup>33</sup> *Id.*

<sup>34</sup> *See id.* at 11.

operational flexibility hallmark for an active competitive retail market. Vistra encourages the Department to make such a clarification, to the extent it moves forward with this requirement.

## **V. COMPETITIVE SUPPLIER REPORTS SHOULD BE CONFIDENTIAL**

In its February 5 Memorandum, the Department proposes to require that competitive suppliers “report periodically on the number of residential customers they serve through automatic renewal provisions that are included in the customers’ contracts” (the “Auto Renewal Report”).<sup>35</sup> The Department also proposes to require competitive suppliers to periodically report on the “total number of residential customers and the number of low-income customers they enrolled during the specified period” through various marketing channels (the “Supplier Enrollment Report”).<sup>36</sup> Both the Auto Renewal Report and the Supplier Enrollment Report also require the disclosure of the number of customers served as of the last day of the reporting period.<sup>37</sup> To the extent the Department implements these reporting obligations, Vistra requests that the Department issue a standing order that such reports can be filed confidentially.

The information about the number of residential customers with contract term expirations, the number of those contracts with automatic renewal provisions to fixed or monthly pricing, the number of those contracts for which automatic renewal provisions took effect, and the current customer counts broken down by the type of automatic renewal provision (for the Auto Renewal Report) and the number of customers enrolled by marketing channel and current customer counts (for the Supplier Enrollment Report) is commercially valuable, confidential and proprietary, market-sensitive information.

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<sup>35</sup> February 5 Memorandum, at 16.

<sup>36</sup> *Id.* at 17.

<sup>37</sup> *Id.* at 16, 17.

Public disclosure of this information would reveal a competitive supplier's business, marketing, contracting, and customer-retention strategies. For instance, a competitive supplier's competitors could determine whether a contract provision that had an automatic renewal to a fixed price term was more or less effective than a contract that had an automatic renewal to a monthly price. Since each Auto Renewal Report would include the number of contracts with term expirations and the current customer count, comparing each quarterly report for the same competitive supplier could show the overall success of that company's retention efforts. Furthermore, reporting quarterly the number of residential customers enrolled by marketing channel could show the overall success of that company's marketing efforts. This puts those competitive suppliers that invested the time and effort in developing marketing and retention strategies at a disadvantage if the information is released publicly as a competitor could simply review quarterly reports and modify or enhance its own programs and practices without having to expend the time and effort to test various strategies.

In Vistra's experience, this information is not made available to its competitors or the public at large and, to the extent this information is provided to any third-party, it is subject to confidentiality obligations. Furthermore, the Department has individually granted motions for protective treatment in this proceeding for similar types of information.<sup>38</sup>

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<sup>38</sup> See, e.g., Hearing Officer's stamp-grant of Direct Energy Services, LLC's Motion for Protective Treatment (Sept. 19, 2019) (requesting protective treatment on the Automatic Renewal Report and Contract Pricing Report).

## **VI. THIRD-PARTY MARKETING VENDOR REPORTS SHOULD NOT BE SHARED WITH COMPETITORS**

In its February 5 Memorandum, the Department proposes to require competitive suppliers to provide the Department updated lists of third-party door-to-door and telemarketing vendors.<sup>39</sup> The Department proposes that information would be provided to the Attorney General on a confidential basis and seeks comments on whether this information should be provided to other stakeholders on a confidential basis.<sup>40</sup> Vistra requests that the Department not require a competitive supplier to provide its list of vendors to any entity other than the Department and the Attorney General, even on a confidential basis.

Vistra and all other competitive suppliers in the commonwealth operate in the highly competitive retail market for electricity. In this market, companies compete on a variety of factors, including without limitation, customer service and product offerings. Over the years, Vistra's licensed competitive suppliers have expended considerable amounts of time and resources in the development and operation of their businesses, including their relationship with their vendors that have valuable industry-related knowledge.

Vistra, both directly and through the combined knowledge and experience of its affiliates, has accumulated and obtained substantial amounts of valuable business knowledge and information concerning the Massachusetts retail electric market over many years and at great expense. As such, it is difficult for competitors, many of whom do not enjoy the same industry experience and knowledge, to properly acquire or duplicate this information.

Allowing competitors to quickly acquire the information and knowledge reflected in the third-party marketing vendor reports regarding a competitive supplier's workforce, and saving

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<sup>39</sup> February 5 Memorandum, at 9.

<sup>40</sup> *Id.*

competitors the time and expense associated with obtaining the requisite information and knowledge to independently locate and vet the same individuals would cause a competitive supplier economic harm and put it at a competitive disadvantage. A competitor with access to the competitive supplier's vendor list could use this information to undermine the supplier's relationships with its vendors and attempt to contract with these same vendors on better terms, likewise causing the competitive supplier economic harm and putting it at a competitive disadvantage.

Accordingly, the third-party marketing vendor reports should only be disclosed to the Department and the Attorney General, on a confidential basis, given that the reports derive actual and potential independent economic value from not being generally known to, and not being readily ascertainable through proper means by, competitors who can obtain economic value from their disclosure, even if the information is provided on a confidential basis.

### **CONCLUSION**

For all the foregoing reasons, the Department should allow for (1) operational flexibility in its door-to-door notification requirements, (2) door-to-door marketing and telesales scripts to identify the customer's distribution company, (3) updates to pricing information in direct mail marketing materials to be used without Department review so long as the template was submitted to the Department, and (4) the exclusion of voicemails and calls that do not result in sales from telesales recordings. Furthermore, Vistra encourages the Department to deem confidential any periodic reporting related to automatic renewals or customer enrollments and to require disclosure of third-party marketing vendor reports only to the Department and the Attorney General.

Respectfully submitted,

**VISTRA ENERGY CORP.**

A handwritten signature in black ink, appearing to read "Eric K. Runge", is written over a horizontal line.

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Dated: March 5, 2020